Filed 1/10/11 P. v. Moreno CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LUIS ALBERTO MORENO, Defendant and Appellant.	F056999 (Super. Ct. No. VCF196298) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Paul A. Vortmann, Judge.

Curt R. Zimansky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, Luis Alberto Moreno (appellant) was convicted of two counts of assault with a deadly weapon: in count 1 of assault with a knife and in count 2

of assault with brass knuckles (Pen. Code, § 245, subd. (a)(1)).[1] The jury found true the allegation that both counts were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). The court sentenced appellant to a total of 10 years 8 months in state prison, consisting of the middle term of three years plus an additional five-year gang enhancement on count 1, and a consecutive one-year, plus an additional one-year eight-month gang enhancement on count 2. Appellant received 561 days' credit for time served and conduct credit, which was subsequently amended to a total of 564 days.

On appeal, appellant contends (1) that the trial court erroneously denied his *Wheeler/Batson*[2] motion challenging the prosecutor's use of a peremptory challenge; (2) that there is insufficient evidence to support appellant's conviction for assault with brass knuckles; (3) that the court erred when it imposed rather than stayed sentence on count 2; and (4) that the court erred when it imposed an enhancement on count 2. Appellant also asks that we order that an amended abstract of judgment be issued to accurately reflect his custody credits. We agree only with his last contention, and in all other respects, affirm.

FACTS

On the morning of December 30, 2007, J.M. was standing outside his house in Farmersville when a red or burgundy car drove by and stopped 50 or 100 feet past him. Stephen Castro got out of the car, called J.M. a "Scrapa," a derogatory term used by Norteno gang members to refer to Sureno gang members, and acted "like he wanted to start a fight."

Castro hit J.M. and J.M. fought back to protect himself, at one point knocking Castro to the ground. While Castro was on the ground, appellant got out of the car and ran to towards J.M. with a knife. Castro got up, put on brass knuckles and hit J.M. in the

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), overruled in part by *Johnson v. California* (2005) 545 U.S. 162, 173 (*Johnson*); *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

neck and jaw bone with the brass knuckles. Appellant tried to stab J.M., but J.M. used a defensive position with his sweatshirt to protect himself. Appellant then stabbed J.M. in the stomach, through the sweatshirt, and stabbed him in the face.

During the incident, appellant and Castro yelled "a bunch of bad words" at J.M., including "Scrapa." One of the two also "started saying Norte things" at J.M. as well.

J.M.'s father saw Castro and appellant beating his son, so he grabbed a skateboard, hit appellant with it, and told him to leave his son alone. At this point, Castro was no longer involved in the fight and was standing by the street. Castro then told appellant the police were coming and said "Let's go." The two got into the car and left.

J.M.'s sister was in the house looking out the window and saw "two young men" on top of her brother. She saw the skinnier of the two hit her brother in the face and body with brass knuckles. She then saw the other person hit her brother. She did not see a knife, but saw her brother use his sweatshirt to defend himself. The two assailants ran away when her father came outside and hit the fatter of the two with a board. While the two were running to the car, she heard them say "Scrap" or "Scrapa."

At trial, J.M. claimed that he associated with the Sureno gang at the time of the incident but that he was not an active Sureno, although he acknowledged having gang tattoos. He admitted, at trial, to being a current active gang member.

Officer Manuel Franco arrived at the scene shortly after the assailants left. While Officer Franco questioned him, J.M. noticed the red car in the distance. Officer Rafael Vasquez stopped the vehicle; Castro was driving and appellant was in the passenger seat. Appellant was wearing clothing with red lettering and had a small three-inch knife with a San Francisco '49er logo on it. Castro was wearing red shoes and had a black knife on him. The officer also discovered a compact disk (CD) with some gang monikers on it. The writing on the CD was red and the letter "S" on one of the words was crossed out. The color red is associated with the Norteno gang.

Appellant told Officer Vasquez that he and Castro were returning to Exeter from Farmersville when they saw "a Scrapa standing in the corner at a house … throwing gang

signs towards him and Mr. Castro." Appellant, who admitted being a Norteno, said he and Castro parked the vehicle, got out, and attacked J.M. because he was a Sureno. Appellant told Vasquez he had brass knuckles in the car but that he did not use them on J.M. No brass knuckles were found on appellant or in the car.

While Castro and appellant were detained, J.M. identified appellant as the person who tried to stab him and Castro as the one who hit him with the brass knuckles. J.M.'s father identified appellant, in a photo lineup, as one of the perpetrators.

Officer Vasquez testified as a gang expert. He opined that appellant and Castro were active Norteno gang members and that the assault on J.M. was a gang-related crime. He also described the primary activities of Norteno gang members in the county, discussed two predicate offenses involving members of the gang, and explained how the crime benefited the gang.

Walter Kushnir testified as a gang expert for the defense. He opined that appellant was not an active gang member at the time of the incident and that he did not get involved in the fight for the benefit of the gang. Appellant's sister and father testified that appellant's room was light blue or lavender. His sister testified that she had not seen gang-related items in his room, and his father testified that he had not seen appellant wearing a lot of red clothing or items with the number 14. Appellant's mother testified that appellant had received a small pocketknife for Christmas.

DISCUSSION

1. Peremptory Challenge

Appellant challenges the trial court's denial of his *Wheeler/Batson* motion with regard to a Hispanic prospective juror. Hispanics are a cognizable group for purposes of *Wheeler/Batson* analysis. (*People v. Trevino* (1985) 39 Cal.3d 667, 686, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1221.)

"The purpose of peremptory challenges is to allow a party to exclude prospective jurors who the party believes may be consciously or unconsciously biased against him or her. [Citation.]" (*People v. Jackson* (1992) 10 Cal.App.4th 13, 17.) Peremptory

challenges may properly be used to remove jurors believed to entertain specific bias, i.e., bias regarding the particular case on trial or the parties or witnesses thereto. (*Wheeler, supra*, 22 Cal.3d at p. 274.) However, "'[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. [Citations.]' [Citation.]" (*People v. Bell* (2007) 40 Cal.4th 582, 596; see also *Batson, supra*, 476 U.S. at pp. 88-89; *Wheeler*, *supra*, at pp. 276-277.)

> "The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard to be used by trial courts when motions challenging peremptory strikes are made. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 541, quoting *Johnson*, *supra*, 545 U.S. at p. 168, fn. omitted.)

The California Supreme Court has "endorsed the same three-part structure of proof for state constitutional claims. [Citations.]" (*People v. Bell*, *supra*, 40 Cal.4th at p. 596; see *Wheeler*, *supra*, 22 Cal.3d at pp. 280-282.)

With these principles in mind, we turn to the facts of the case before us.

During voir dire, defense counsel made a motion on *Wheeler/Batson* grounds, alleging that the prosecutor had engaged in "a systematic knocking off of every Hispanic male prospective juror that we have." As argued by defense counsel, the prosecutor exercised peremptory challenges on Hispanic prospective jurors Nos. 40, 26, and 52, as

well as "the Hispanic female who was from the Farmersville/Ivanhoe area," subsequently identified as juror No. 8.

The trial court made a determination that the jurors were members of a cognizable group for purposes of the *Wheeler/Batson* motion, that there was "an inference of group bias because of it," and solicited a response from the prosecutor. The prosecutor explained that juror No. 52 "could barely talk," "couldn't even remember what his children did," and "had what looked like prison tattoos on his arms." Juror No. 26 "has friends that are gang members. He's ridden around with guys, gang members who were carrying guns," and the prosecutor did not "think he could be fair … in those … circumstances." Affiliating with gang members was also a concern with juror No. 40, who had on "a Raiders jersey," and "indicated that he has friends that are gang members." The prosecutor also noted that juror No. 40 "wasn't being articulate" and his answers were "very nonchalant." As for the "Hispanic female … from the Farmersville/Ivanhoe area," juror No. 8, the prosecutor explained:

> "And as far as the last woman, she's been here all of her life. She's never left the county. She's been here for I think 30 years, 28 or 30. Based just upon her limited experience alone, I don't think she'd be a good candidate for this."

The trial court then denied the motion, stating it found that the challenges "were made on a group neutral basis based on the responses and the observations that were made by [the prosecutor]."

Appellant's argument focuses only on the prosecutor's exercise of a peremptory challenge to excuse juror No. 8. He contends the reasons given by the prosecutor do not withstand scrutiny under *Wheeler/Batson*. We disagree.

The trial court ruled for the defense in step one of the *Wheeler/Batson* analysis by determining that the four prospective jurors were members of a cognizable group. It then asked the prosecutor to come forward with a race-neutral explanation as to each challenge, which is step two of the *Wheeler/Batson* analysis. (See *People v. Silva* (2001) 25 Cal.4th 345, 384.)

> "In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law.… [¶] A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (*Hernandez v. New York* (1991) 500 U.S. 352, 359-360 (plur. opn. of Kennedy, J.).)

At this step, the explanation need not be persuasive or even plausible. (*Purkett v. Elem* (1995) 514 U.S. 765, 767-768.)

Here, the prosecutor stated race-neutral reasons with respect to each of the excused jurors: No. 52 (could barely talk, lack of memory, had prison tattoos); No. 26 (friends who are gang members); No. 40 (friends who are gang members); and No. 8 (limited experience because she had not been out of the county).

At step three of the *Wheeler/Batson* analysis, the trial court must decide whether the opponent of the peremptory strike has proved purposeful racial discrimination by a preponderance of the evidence. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 767; *People v. Hutchins* (2007) 147 Cal.App.4th 992, 997-998.) At this point, the persuasiveness of the proffered justification becomes relevant (*Johnson*, *supra*, 545 U.S. at p. 171), as implausible or fantastic justification will often be found to be a pretext for purposeful discrimination. (*Purkett v. Elem*, *supra*, at p. 768.)

But a prosecutor is presumed to use his or her peremptory challenges in a constitutional manner (*People v. Alvarez* (1996) 14 Cal.4th 155, 193; *Wheeler*, *supra*, 22 Cal.3d at p. 278), and the justification proffered for the particular excusal "need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136.) "What is required are reasonably specific and neutral explanations that are related to the particular case being tried." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1218.)

> "All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]' [Citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 924, quoting *Purkett v. Elem*, *supra*, 514 U.S. at p. 769.)

Once the prosecutor "come[s] forward with an explanation that demonstrates a neutral explanation related to the particular case to be tried" (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1216), the trial court must then satisfy itself that the explanation is genuine. (*People v. Hall* (1983) 35 Cal.3d 161, 168.) "In [this] process, the trial court must determine not only that a valid reason existed but also that the reason actually prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.)

> "This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, for 'we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' [Citation.]" (*People v. Hall*, *supra*, 35 Cal.3d at pp. 167-168.)

"When a trial court has made a sincere and reasoned effort to evaluate each of the stated reasons for a challenge to a particular juror, we accord great deference to its ruling, reviewing it under the substantial evidence standard. [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 104-105.) Deference does not, of course, "imply abandonment or abdication of judicial review." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 340.)

We find that substantial evidence supports the trial court's ruling with respect to juror No. 8. When questioned by the trial court, she stated that she had lived in Ivanhoe for about 15 years, she had worked at a real estate office for the past two years, she did not have any children, she had not had previous jury service, she had not been involved in any criminal case as a suspect or a victim, she had no medical or legal training, and she had a relative who was a correctional officer. She did not recognize any names on the

witness list. She answered affirmatively when asked if she understood the principle that no extra weight is given a witness's testimony because of his or her occupation, and whether she could be fair and impartial to both sides in the case.

Upon further questioning by the prosecutor, juror No. 8 stated that she was born in Farmersville but moved to Ivanhoe as a "kid." She acknowledged that she was aware of "what's going on out in Ivanhoe with regards to the gangs," but when asked what she thought about that, she said, "I've never really been part of that at all. We don't really—like our whole family doesn't really get involved in any of that so I just—I haven't really been in any kind of events that involves gang members." When asked if she was aware of "the gang injunction that's happened in Ivanhoe with regards to South Side Kings," she said yes. She described her relative who was a correctional officer as a second or third cousin.

Appellant contends that the court erred in accepting the prosecutor's reason for striking juror No. 8 because it was "clearly pretextual" and "otherwise unsupported by the record." We disagree. Juror No. 8 testified that she had lived in Ivanhoe for about 15 years and that she had moved there from Farmersville as a "kid." Based on these statements, it appears the juror No. 8 was fairly young and had not lived anywhere other than the small towns of Ivanhoe and Farmersville. This alone could serve as a valid race-neutral reason to excuse her. (See *People v. Sims* (1993) 5 Cal.4th 405, 429-430 [youthful appearance and lack of experience are facially race-neutral explanations for dismissal of jurors]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 [limited life experience is race-neutral explanation for peremptory challenge].)

The situation here is unlike that in *People v. Allen* (2004) 115 Cal.App.4th 542 on which appellant relies. In *Allen*, the prosecutor cited only the juror's "demeanor" as a reason for the peremptory challenge. The record provided nothing to explain what it was that the prosecutor had observed, and there was no basis for the trial court to evaluate the genuineness of the purported nondiscriminatory reason for the challenge. (*Id.* at p. 551.)

Appellant also argues that, in line with *Miller-El v. Dretke* (2005) 545 U.S. 231, a comparative analysis of prospective juror No. 8 with other jurors further bolsters his argument that the prosecutor's reason for striking juror No. 8 was pretextual. Again, we disagree.

In *People v. Lenix* (2008) 44 Cal.4th 602, 622, our Supreme Court explained:

> "*Miller-El*[*v. Dretke*], *supra*, 545 U.S. 231, and *Snyder[v. Louisiana* (2008)] 552 U.S. [472], demonstrate that comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination. These cases stand for the proposition that, as to claims of error at the *Wheeler/Batson*'s third stage, our former practice of declining to engage in comparative juror analysis for the first time on appeal unduly restricts review based on the entire record. As the high court noted in *Snyder*, 'In *Miller-El v. Dretke*, the Court made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, *all* of the circumstances that bear upon the issue of racial animosity *must* be consulted.' (*Snyder*, at p. [477], italics added.) Thus, evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by the defendant and the record is adequate to permit the urged comparisons. [¶] Nevertheless, like the *Snyder* court, we are mindful that comparative juror analysis on a cold appellate record has inherent limitations. (See *Snyder*, *supra*, 552 U.S. at [pp. 483-484].) Experienced trial lawyers recognize what has been borne out by common experience over the centuries. There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. 'Even an inflection in the voice can make a difference in the meaning. The sentence, "She never said she missed him," is susceptible of six different meanings, depending on which word is emphasized.' [Citation.] '[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record.' [Citation.]" (Fn. omitted.)

In *Miller-El v. Dretke*, the Supreme Court had the benefit of knowing the ethnicity of the jury venire as well as those jurors ultimately selected to serve on the jury. The Supreme Court had the jurors' pretrial questionnaires for purposes of comparison. (*Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 240-242.) Here, we have no evidence as to the number of

Hispanic jurors who actually deliberated and returned the verdicts. Nor do we have any evidence as to mixed-race jurors.

Appellant seeks to compare the prosecutor's use of a peremptory challenge to excuse juror No. 8 with his acceptance of juror Nos. 5 and 44. As previously discussed, juror No. 8 was excused because she had lived in the county all of her life and had "limited experience."

Juror No. 5 testified that she lived in Exeter for 21 years, had been an accounting clerk for four years, had no children, had previously served on a criminal jury, had testified in a criminal case, had pharmacy technician training, had not been involved in law enforcement and did not know anyone involved in law enforcement. Juror No. 44 testified that she had lived in Visalia for 27 years, was a stay-at-home mother of a two-year-old, had never been on a jury before, had not been involved in a criminal case, had no legal or medical training, and was not involved in law enforcement, although her father-in-law was a prison guard.

On the record before us, we do not have the ability to evaluate the prosecutor's and panelists' demeanor. Nor do we have the trial court's ability "' to assess the plausibility' of the prosecutor's proffered reasons" for excusing the prospective jurors at issue. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 625, quoting *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 252.) But as our Supreme Court noted in *People v. Lenix*, "While an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer. Likewise, reviewing courts should not do so." (44 Cal.4th at p. 631; see also *People v. Gray* (2005) 37 Cal.4th 168, 190-191 [prosecutor may have preferred not to strike the other jurors for other positive reasons that suggested they would be a favorable juror for the prosecution].) Here, the prosecutor may have found juror No. 5's prior criminal jury experience and the fact that juror No. 44 lived in a larger town and/or that her father-in-law was a

correctional officer favorable attributes for the People. These facts could reasonably cause the prosecutor to distinguish between the two sets of jurors in question.

In addition,

> "[i]t is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side. Near the end of the voir dire process a lawyer will naturally be more cautious about 'spending' his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel." (*People v. Johnson*, *supra*, 47 Cal.3d at pp. 1220-1221.)

Juror Nos. 8 and 5 were both among the first 18 prospective jurors called at random, although juror No. 8 was excused in the first batch of challenges. Juror No. 44 was not selected and questioned until well into the selection process after the *Wheeler/Batson* motion was heard.

In sum, given the substantial evidence standard of review and the appropriate deference we must extend to the trial court, we conclude the peremptory challenge of juror No. 8 was proper and there is no *Batson/Wheeler* error.

2. Sufficiency of the Evidence

The jury convicted appellant in count 2 of assault with a deadly weapon, to wit, brass knuckles. Appellant contends the evidence was insufficient to establish either that he himself assaulted J.M. or that he aided and abetted Castro in his attack on him. We disagree.

To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the whole record in the light most favorable to the judgment to determine

whether it discloses evidence that is reasonable, credible, and of solid value, such that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Catley* (2007) 148 Cal.App.4th 500, 504.) The reviewing court must draw all reasonable inferences in support of the judgment. (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

All persons concerned in the commission of the crime, whether they are the direct perpetrators or aid and abet its commission, are principals in any crime so committed. (§ 31.) To "aid" means to assist or supplement the efforts of another. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 410.) To "abet" means to incite or encourage. (*Ibid.*) Whether a person has aided or abetted is a question of fact. (*People v. Herrera* (1970) 6 Cal.App.3d 846, 852.)

"'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.]" (*People v. Campbell*, *supra*, 25 Cal.App.4th at p. 409.) Mere presence at the scene of a crime, or knowledge of a crime and failure to prevent it, are insufficient to support aider and abettor liability. (*Ibid*.) Factors that may be taken into account are the aider and abettor's presence at the scene of the crime, companionship with the direct perpetrator, and conduct before and after the offense was committed. (*Ibid.*)

In addition, the defendant's "intent to encourage or facilitate the actions of the perpetrator 'must be formed prior to or during "commission" of that offense.' [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039, quoting *People v. Cooper* (1991) 53 Cal.3d 1158, 1164, italics omitted.) And where the defendant acts "with knowledge of the purpose of the perpetrator of a crime, his intent to aid the perpetrator can be *inferred*." (*People v. Beeman* (1984) 35 Cal.3d 547, 558.)

Castro and appellant were driving together when they noticed J.M. and stopped because he was a rival gang member. Castro got out of the car and instigated the unprovoked attack on J.M. When J.M. hit back and knocked Castro to the ground, appellant got out of the car and ran toward J.M. with a knife. At that point, Castro put on brass knuckles and hit appellant. Appellant then stabbed J.M. in the stomach and face. After J.M.'s father hit appellant with a skateboard, Castro and appellant fled the scene together. When Officer Vasquez subsequently spoke to appellant, appellant told him he and Castro attacked J.M. because he was a Sureno.

Appellant contends there was insufficient evidence that appellant took part in the joint assault with the specific intention of aiding Castro's attack with the brass knuckles. But an aider and abettor's guilt extends to any natural and probable consequence of the target crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 254.) And the collateral act does not have to be planned, or even substantially certain to result from the commission of the planned act to be a "'natural and probable'" consequence of the target crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530.)

In *People v. Butts* (1965) 236 Cal.App.2d 817, the trial court found that the defendant did not aid and abet a stabbing committed by a coparticipant during a brawl. The two were unexpectedly attacked by a group of people with whom they had had an earlier altercation. (*Id.* at p. 824.) The defendant was fighting some 45 to 100 feet away from his coparticipant when the coparticipant stabbed his attackers. (*Id.* at pp. 824-825.) The fact that both the defendant and his coparticipant were involved in separate fights was critical in finding that the defendant likely had not aided and abetted his coparticipant in the stabbing. (*Id.* at pp. 836-837.)

In contrast, in *People v. Godinez* (1992) 2 Cal.App.4th 492, the trial court found that there was sufficient evidence that the defendant aided and abetted voluntary manslaughter after a fight in which the victim was stabbed, despite the fact that the defendant claimed he did not know of the knife or that it would be used. (*Id.* at p. 500.) But the evidence showed that the defendant, who participated in the attack, had driven

around with the attackers for several hours before the assault, permitting an inference that he knew of the presence of the knife, and he was identified as the instigator of the fight, initially making gang signs to the victim and pursuing his vehicle, signaling a challenge. (*Id.* at pp. 496, 500.)

Here, the attack is more similar to the fight in *Godinez* than the brawl in *Butts.* Appellant and Castro were self-admitted gang members who stopped to attack J.M. because he belonged to a rival gang. Although Castro started the fight, appellant joined in with a knife, after which Castro put on the brass knuckles and continued to assault J.M. Appellant admitted to having brass knuckles, although he claimed not to have used them. There is sufficient evidence that appellant aided and abetted Castro's assault of J.M. with a deadly weapon, to wit, brass knuckles, to sustain the conviction on count 2.

3. Section 654

Appellant argues the trial court violated section 654,[3] which prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *People v. Harrison* (1989) 48 Cal.3d 321, 335), when it imposed a separate, consecutive sentence on count 2. According to appellant, the attack on J.M. was a single indivisible course of conduct. We disagree.

> "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

[3]Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

If, on the other hand, the defendant harbored "multiple criminal objectives" that were independent of and not merely incidental to each other, the defendant may be punished for each statutory violation committed in pursuit of each objective, "'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.) "'A defendant's criminal objective is "determined from all the circumstances ...."'" (*Ibid.*)

Whether multiple convictions were part of an indivisible transaction is primarily a question of fact for the trial court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) We review a challenge under section 654 for substantial evidence to support the trial court's determination. (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1336-1337.) Moreover, this deferential standard of review applies whether the trial court's findings are explicit or implicit. (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585.) Thus, although section 654 was not raised in this case and the court made no express findings as to its possible application,[4] we must presume from the fact it imposed separate sentences that it found appellant acted pursuant to multiple criminal objectives and must uphold that finding unless there is no substantial evidence to support it.

Appellant's argument that the encounter with J.M. was a single course of conduct is without merit. Substantial evidence supports the trial court's conclusion that the two offenses were separate and distinct. When Castro attacked J.M. and J.M. then knocked Castro to the ground, appellant got out of the car and ran towards J.M. with a knife. This allowed Castro to get up, put on brass knuckles and then assault J.M. with them. Implicit in appellant's conviction of count 2 is a finding by the jury that appellant harbored the intent or purpose of facilitating, promoting, instigating, or encouraging Castro's assault of J.M. with the brass knuckles. (CALCRIM No. 400.) But appellant was also convicted in

[4]Defense counsel argued that the sentence for count 2 be run concurrent rather than consecutive to count 1, but section 654 was not mentioned by counsel or the trial court.

count 1 of personally assaulting J.M. with a knife, which required a finding of a separate criminal objective. (CALCRIM No. 875.)

The offenses of aiding and abetting Castro in assaulting J.M. with brass knuckles and personally attacking J.M. with a knife were two separate and distinct crimes, and section 654 does not bar separate punishment for both. (*People v. Latimer*, *supra*, 5 Cal.4th at pp. 1216-1217.)

4. Gang Enhancement

With respect to count 2, the jury found true the allegation that the assault was committed "for the benefit of … a criminal street gang, within the meaning of … section 186.22, subdivision (b)." (Capitalization omitted.) Because the jury found the allegation true, the trial court was required to impose a sentence enhancement under section 186.22, subdivision (b)(1)(A), (b)(1)(B), or (b)(1)(C), depending on whether the crime is classified as a serious felony in section 1192.7 or a violent felony in section 667.5.

In his opening brief appellant contends that the section 186.22, subdivision (b)(1)(B) enhancement imposed in count 2 was unauthorized because assault with a deadly weapon, to wit, brass knuckles, on an aiding and abetting theory was not a serious felony pursuant to section 1192.7, subdivision (c). But in his reply brief, appellant accepts respondent's argument that section 1192.7, subdivision (c)(31), enacted as part of Proposition 21, approved by voters in 2000, is applicable as it makes any assault with a deadly weapon, even if it does not involve personal use, a serious felony. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1067, fn. 3.) We agree with respondent's argument and accept appellant's withdrawal of the issue.

5. Custody Credits

At sentencing, appellant was awarded 561 days' statutory and time served credit, and those credits were entered on appellant's abstract of judgment. Nine months later, the trial court granted appellant's ex parte motion to amend his custody credit award to a total of 564 days and ordered that the abstract of judgment dated January 14, 2009, be amended to reflect the correct presentencing credits of 564 days. But, according to

appellant, no amended abstract of judgment has issued showing the change in appellant's presentence custody credits, and he asks that this court order the clerk of the trial court to do so. Respondent argues that the trial court has already ordered that the abstract of judgment be amended to reflect the change and that no further order from this court is necessary.

Rendition of the judgment is normally an oral pronouncement, which the abstract of judgment should summarize without addition or modification. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Where the abstract is inaccurate, it must be corrected to reflect the judgment actually imposed. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We agree with appellant that the abstract of judgment must be amended to reflect 564 days of custody credit and, if the clerk of the court has not already done so, we order that the trial court prepare an amended abstract of judgment reflecting the accurate presentence custody credits. (*Ibid.* [proper for appellate court to order correction of abstract].)

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting 564 days of custody credits. The trial court is further directed to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitations. In all other respects, the judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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GOMES, J.